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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

CATHLEEN CARDOZA et al.,

Plaintiffs and Appellants,

v.

KEVIN GONSALVES et al.,

Defendants and Respondents.

A150440

(Sonoma County
Super. Ct. No. SCV245387)

Following their purchase of commercial real property in Santa Rosa, plaintiffs Cathleen and Edward Cardoza brought tort and contract claims against various parties, including the seller's real estate agents, Kevin Gonsalves and Leading Edge Properties, Inc. (Leading Edge). A jury found Gonsalves and Leading Edge liable for professional negligence and negligent nondisclosure of facts, but found they did not engage in intentional misrepresentation, deliberate concealment, or negligent misrepresentation. After hearing post-trial motions, the trial court concluded the claims for professional negligence and negligent nondisclosure were barred by the statute of limitations and entered judgment for Gonsalves and Leading Edge. The Cardozas appeal, contending the court's statute of limitations ruling was incorrect. We affirm.

I. BACKGROUND

In its post-trial order addressing the statute of limitations, the trial court summarized the transaction and related events giving rise to the present litigation: "This is an action for damages arising out of the sale of a commercial property located at 1724 and 1726 Corby Road, Santa Rosa, California (the 'Corby Property'). The escrow closed

on February 17, 2006. It involved a sale with a lease back by the sellers' corporation, RPM Optoelectronics, Inc. ('RPM'), which was the primary tenant at the time of the sale. The Cardozas bought the property in a [26 U.S.C. §] 1031 exchange as a like-kind investment property. They were represented in the transaction by a team of advisors, brokers Hally Swan and Robert Schepergerdes, Pisenti and Brinker and James Perez, their accountants, and attorney Arthur LaFranchi.^[1] The majority shareholders in RPM were David [Reed] and [his then-wife] Sheryl Reed. The Reeds owned the Corby Property in their own names. The Reeds were represented in the sale by Gonsalves and Leading Edge. The sale was conditioned on a long-term lease for RPM. David Reed formed a new company, Reflex, LLC ('Reflex'). David Reed was the sole owner of Reflex. In 2005 and early 2006 Reed began to move assets, employees, and corporate opportunities from RPM to Reflex. RPM stopped paying rent [at the Corby Property] in July 2006 and quickly moved out. The evidence showed that the Reeds and RPM had consulted a bankruptcy attorney several months earlier. Robert Caro, the property manager the Cardozas hired for the Corby Property, testified that in the first few days of July 2006, in the course of investigating RPM's failure to pay the July rent, he learned that RPM was moving out of the Corby Property. Mr. Caro called [the Cardozas'] attorney, Arthur LaFranchi, and informed him that RPM was moving out. Mrs. Cardoza testified that Mr. LaFranchi contacted the Cardozas on July 11, 2006 and broke the news to them that RPM was moving out and was planning to file a bankruptcy [proceeding]. The complaint in this action was filed on June 30, 2009."

The Cardozas paid \$4.7 million for the Corby property on February 17, 2006. This sum included \$2.2 million of the Cardozas' money (apparently proceeds from the sale of the family ranch) and \$2.5 million in borrowed funds. The Cardozas sold the

¹ In 2005, the Cardozas and other relatives sold a family ranch. To complete a "like kind" exchange for purposes of federal tax law (see 26 U.S.C. § 1031(a)(1)), the Cardozas needed to use their share of the proceeds to purchase an income-producing property. There was evidence that the Cardozas were relying on the new property and the income it would produce for their security in retirement.

property to an electrician's union in 2012 for about \$1.2 million, all of which went to pay off a bank loan and expenses related to the sale.

The Cardozas' operative Seventh Amended Complaint asserts multiple tort and contract causes of action against David Reed, Gonsalves, Leading Edge and other defendants. The complaint alleges in part that Reed made misrepresentations and concealed material facts pertaining to RPM's financial condition and his intention to make rental payments to the Cardozas. The complaint asserts that Reed's realtors, Gonsalves and Leading Edge, participated in Reed's scheme to defraud the Cardozas, made false representations, and knew or should have known of the true facts concerning RPM's condition and Reed's intentions.

At the conclusion of the trial, the jury returned special verdicts addressing numerous claims and issues. As pertinent to this appeal (and as we discuss below), the jury found in its answers to questions on special verdict forms that Gonsalves and Leading Edge were negligent and failed to disclose all facts known to them that materially affected the value or desirability of the Corby property. The jury found, however, that Gonsalves and Leading Edge were not liable on theories of intentional misrepresentation, concealment, negligent misrepresentation, and conspiracy. Specifically, as later summarized by the trial court, the jury found Gonsalves and Leading Edge (1) "made a false representation of one or more important facts to the Cardozas but . . . these representation(s) were not made recklessly or without regard for [the] truth," (2) "did not intentionally fail to disclose any important facts," and (3) "honestly believed the representations they made were true when they made them and . . . had reasonable grounds for believing the representations were true when they were made."

In addition, in response to a special interrogatory addressing the statute of limitations, the jury found that, before June 30, 2007 (i.e., two years before the date they filed suit), the Cardozas or their advisory team discovered or knew of facts that "would have caused a reasonable person to suspect that they had suffered harm that was caused by someone's wrongful conduct[.]"

Based on the jury's findings on these points, the court granted a request by Gonsalves and Leading Edge for entry of judgment in their favor. The court concluded in a detailed written order that the two-year statute of limitations for negligence (Code Civ. Proc., § 339, subd. 1) applies to the claims on which the Cardozas prevailed against Gonsalves and Leading Edge.² The court held the Cardozas' complaint, filed on June 30, 2009, nearly three years after RPM stopped paying rent and moved out of the Corby property, was untimely. The court later denied the Cardozas' motions for judgment notwithstanding the verdict (JNOV) and for a new trial. The Cardozas appealed.

II. DISCUSSION

The Cardozas contend their complaint was timely filed because (1) a three-year (rather than a two-year) limitations period applies to the claims at issue, and (2) the accrual of their claims was postponed pursuant to the "discovery rule." We disagree and conclude the trial court correctly rejected both arguments.

A. The Cardozas' Claims and the Jury's Verdicts

Eight causes of action pertaining to Gonsalves and Leading Edge were submitted to the jury: (1) conspiracy to commit fraud (first cause of action in the Seventh Amended Complaint), (2) intentional misrepresentation (second cause of action), (3) concealment (fourth cause of action), (4) "broker's liability for breach of duty to disclose" (fifth cause of action), (5) negligent misrepresentation (12th cause of action), (6) "real estate sellers' nondisclosure of material facts" (13th cause of action), (7) "negligent preparation and presentation of statutory form" (14th cause of action), and (8) professional negligence (15th cause of action). The jury provided its verdicts for these claims in a series of numbered special verdict forms (Nos. 10-15, 16A-16B and 18).

The jury found in favor of Gonsalves and Leading Edge on the claims for conspiracy, intentional misrepresentation and concealment (Special Verdict Form Nos. 11, 12, 16A and 16B). The jury also found Gonsalves and Leading Edge did not negligently make any affirmative misrepresentations; they honestly and reasonably

² Undesignated statutory references are to the Code of Civil Procedure.

believed their representations were true when they made them (Special Verdict Form No. 13). Finally, the jury found in favor of Gonsalves and Leading Edge on the claim for negligent preparation of a statutory form (Special Verdict Form No. 10) and found they did not act with malice, oppression or fraud for purposes of imposing punitive damages (Special Verdict Form No. 18).

The jury found in the Cardozas' favor on two verdict forms: Special Verdict Form Nos. 14 and 15. On Special Verdict Form No. 14, entitled "Professional Negligence," the jury found the conduct of Gonsalves and Leading Edge as the seller's agents in the Corby transaction fell below the standard of care, and their negligence was a substantial factor in causing harm to the Cardozas. On Special Verdict Form No. 15, entitled "Broker's Failure to Disclose," the jury found Gonsalves and Leading Edge did not disclose all facts known to them that materially affected the value or desirability of the Corby property; the Cardozas and their advisory team were not aware of the facts not disclosed; Gonsalves and Leading Edge knew or should have known the Cardozas were not aware of the facts not disclosed; and the Cardozas and their advisory team could not have discovered the facts not disclosed through diligent attention and observation.³

The jury's findings on these forms align most closely with the allegations in the 13th and 15th causes of action in the Seventh Amended Complaint (the claims for "real estate sellers' nondisclosure of material facts" and "professional negligence") and to some extent with certain allegations in the fifth cause of action (for "broker's liability for breach of duty to disclose").⁴ The 13th cause of action alleges Gonsalves and Leading

³ Due to misleading instructions in Special Verdict Form No. 15, the jurors initially left a portion of it blank, but they corrected the omission after the court resubmitted the form to them. Also, in response to supplemental questions submitted by the court, the jury found (1) Gonsalves and Leading Edge intended to induce the Cardozas to purchase the Corby property, and (2) the nondisclosure of material facts by Gonsalves and Leading Edge was a substantial factor in inducing the Cardozas to purchase the Corby property.

⁴ The fifth cause of action includes an allegation that Gonsalves failed to disclose all material facts to the Cardozas. As the trial court noted, that cause of action presented a combination of theories (including "intentional fraud, intentional concealment/non-

Edge failed to disclose facts that were unknown to the Cardozas, including facts pertaining to RPM's leases and financial condition and Reed's transfer of assets from RPM to Reflex. The 15th cause of action alleges Gonsalves and Leading Edge were negligent in failing to discover that RPM was not financially capable of making the required rent payments, and in failing to disclose information learned during the escrow period regarding RPM's future plans that were contradictory to the representations made to the Cardozas.⁵

On a verdict form addressing damages (Special Verdict Form No. 19, "Damages on Multiple Legal Theories"), question 2 asked the jury to enter the amount of damages based on any liability of Gonsalves and/or Leading Edge "for negligence (professional negligence as a realtor or broker, including a seller's broker's breach of duty to buyer)[.]" The jurors awarded a total of \$5 million in response to this question, consisting of \$2.3 million in "past lost rents" and \$2.7 million in "[c]onsequential damages," the same amounts they awarded against Reed as compensatory damages for his fraud.⁶

B. The Applicable Statute of Limitations

The determination of which statute of limitations applies to a given claim is a question of law that we review de novo. (*Ventura County Nat. Bank v. Macker* (1996) 49 Cal.App.4th 1528, 1530 (*Macker*).) "To determine the statute of limitations which applies to a cause of action it is necessary to identify the nature of the cause of action, i.e., the "gravamen" of the cause of action. [Citations.] "[T]he nature of the right sued upon and not the form of action nor the relief demanded determines the applicability of

disclosure, negligent misrepresentation, and negligence"), some of which were rejected by the jury.

⁵ We note there is some overlap among the causes of action in the complaint, as each cause of action states that it incorporates all the preceding allegations (including both the complaint's general allegations and the allegations in the previous specific causes of action).

⁶ The trial court later modified the damage award against Reed.

the statute of limitations under our code.” ’ ’ (*Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 606–607 (*Thomson*).)

The applicable statute of limitations is “determined by the facts alleged in the complaint and proven at trial.” (*Kapner v. Meadowlark Ranch Assn.* (2004) 116 Cal.App.4th 1182, 1189.) Here, the Cardozas succeeded in imposing liability on Gonsalves and Leading Edge on theories of professional negligence (15th cause of action; Special Verdict Form No. 14) and negligent nondisclosure of material facts (13th and fifth causes of action; Special Verdict Form No. 15).

1. Professional Negligence

As the trial court correctly concluded, a claim for professional negligence is governed by the two-year statute of limitations set forth in section 339, subdivision 1, for an “action upon a contract, obligation or liability not founded upon an instrument of writing.” (See *Cyr v. McGovran* (2012) 206 Cal.App.4th 645, 651 (*Cyr*).) This statute of limitations “has been consistently applied to a range of professional negligence actions from those against accountants to those against real estate appraisers. [Citation.] It is that statute of limitations that applies here, to the alleged professional negligence of a real estate agent and broker.” (*Thomson, supra*, 198 Cal.App.4th at p. 606.)

2. Negligent Nondisclosure of Material Facts

The trial court concluded the two-year statute of limitations in section 339, subdivision 1, applied to the Cardozas’ claim against Gonsalves and Leading Edge for negligent nondisclosure of material facts, because the jury’s findings in support of that claim (on Special Verdict Form No. 15) were “based on professional negligence.” (See, e.g., *Macker, supra*, 49 Cal.App.4th at pp. 1530–1531 [negligent misrepresentation claim against accountants was subject to two-year statute of limitations in § 339, subd. 1].) The Cardozas argue the court instead should have applied the three-year statute of limitations applicable to (1) an “action for relief on the ground of fraud or mistake” (§ 338, subd. (d)), or (2) an “action for trespass upon or injury to real property” (§ 338, subd. (b)). We conclude the trial court correctly resolved this issue.

First, as to the three-year statute of limitations for fraud (§ 338, subd. (d)), the Cardozas note that Civil Code section 1710 defines “deceit” as including nondisclosure, i.e., “[t]he suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact.” (Civ. Code, § 1710, subd. 3; see *Loken v. Century 21-Award Properties* (1995) 36 Cal.App.4th 263, 272 (*Loken*) [“California law generally views ‘negligent misrepresentation’ as a species of fraud or deceit”].) And the Cardozas note (as did the trial court) that there is some uncertainty in the case law on this point. In actions involving claims for negligent misrepresentation, some courts have held or stated that the three-year fraud statute of limitations in section 338, subdivision (d) applies (e.g., *Bank of New York Mellon v. Citibank, N.A.* (2017) 8 Cal.App.5th 935, 956 [applying three-year statute but noting split of authority]), while other courts have applied section 339, subdivision 1’s two-year statute of limitations for negligence (e.g., *Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Associates, Inc.* (2004) 115 Cal.App.4th 1145, 1155 (*Hydro-Mill*) [two-year statute applies “where the allegations amount to a claim of professional negligence”]).

To resolve the present appeal, we need not determine (as the Cardozas ask us to do) that one or the other of these statutes of limitations applies in every case involving negligent misrepresentation or negligent nondisclosure. Instead, applying the principle that the “gravamen” of a particular cause of action determines the applicable statute of limitations (*Thomson, supra*, 198 Cal.App.4th at p. 606), we conclude the two-year statute of limitations (§ 339, subd. 1) applies to the Cardozas’ claim against Gonsalves and Leading Edge for negligent nondisclosure of material facts in connection with the Corby transaction.

As noted, there is substantial overlap between the Cardozas’ allegations supporting their nondisclosure cause of action and the allegations supporting their claim for professional negligence, with both emphasizing the realtors’ failure to disclose facts about RPM’s condition and plans. As the trial court correctly recognized, this is a case in which the negligent nondisclosure claim is in essence one for professional negligence,

and the two-year limitations period in section 339, subdivision 1 applies. (See *Hydro-Mill, supra*, 115 Cal.App.4th at p. 1154.)

In addition, we note that, if an identical claim had been brought in connection with a *residential* real estate transaction (i.e., a claim by a buyer alleging nondisclosure by the seller’s broker), a two-year statute of limitations would apply. (Civ. Code, § 2079.4; *Loken, supra*, 36 Cal.App.4th at pp. 272–273.) Civil Code section 2079 codifies case law establishing that, in certain residential real estate transactions, the seller’s broker has a duty to inspect the property and to disclose to the prospective buyer “facts materially affecting the value or desirability of the property” (Civ. Code, § 2079, subd. (a); see *id.*, § 2079.12; *Easton v. Strassburger* (1984) 152 Cal.App.3d 90, 102 (*Easton*); *Loken, supra*, 36 Cal.App.4th at pp. 269–270 [Civ. Code, § 2079 codifies duties recognized in *Easton*].) Civil Code section 2079.4 specifies that a two-year statute of limitations applies to a “legal action for breach of duty imposed by [Civ. Code, § 2079].”

The Cardozas’ claim for nondisclosure in connection with the Corby transaction is analogous to a claim in the residential context that would be subject to Civil Code section 2079.4. The gravamen of both claims is the seller’s broker’s nondisclosure of facts to the buyer. Indeed, Special Verdict Form No. 15 mirrors the language of Civil Code section 2079, asking the jurors whether Gonsalves and Leading Edge “disclose[d] all facts known to them regarding the Corby Property transaction that *materially affected the value or desirability* of the Corby Property to the Cardozas.” (Italics added.) Since the liability of Gonsalves and Leading Edge rests solely on negligent nondisclosure (rather than intentional fraud or deliberate concealment), and in light of the Legislature’s directive that a two-year limitations period should apply in the analogous context of residential real estate, we conclude that the two-year limitations period applicable to professional negligence claims (§ 339, subd. 1), rather than the three-year period

applicable to fraud claims (§ 338, subd. (d)), should apply to the negligent nondisclosure claim here.⁷

The Cardozas contend language in *Loken* requires a contrary result. We disagree. In *Loken*, which involved a claim for negligent misrepresentation in a residential real estate transaction, the appellate court held the two-year limitations period in Civil Code section 2079.4 applied. (*Loken, supra*, 36 Cal.App.4th at pp. 270, 273.) In dicta, the court stated this statute “prevails over the general statute of limitations of three years for fraud and negligent misrepresentation causes of action of Code of Civil Procedure section 338, subdivision (d).” (*Loken, supra*, 36 Cal.App.4th at p. 273.) This statement does not establish that a three year statute of limitations applies to claims for negligent misrepresentation or negligent nondisclosure. (See *Macker, supra*, 49 Cal.App.4th at p. 1531 [the “unsupported dicta” in *Loken* does not establish a three-year limitations period for negligent misrepresentation claims].)

The Cardozas’ fallback argument is that the three-year limitations period for “injury to real property” in section 338, subdivision (b) applies here. They are incorrect. For purposes of determining the applicable statute of limitations, “[w]here negligent conduct has caused injury to real property, the gravamen of the cause of action is the injury to the real property.” (*Cyr, supra*, 206 Cal.App.4th at p. 650.) The injury need not involve physical damage to real property and can include actions that place a cloud on the plaintiff’s title to real property. (*Ibid.*)

But here the Cardozas did not allege or prove any conduct by Gonsalves or Leading Edge that damaged the Corby property or impaired the Cardozas’ title to it. Instead, the Cardozas alleged that, prior to their purchase of the Corby property, Gonsalves and Leading Edge breached their duties as realtors and failed to disclose

⁷ Since the statute of limitations is dispositive of the present appeal, we have no occasion to address the viability or scope of this type of nondisclosure claim in the context of a purchase of commercial real estate. (See *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 875–876 [declining to apply *Easton* disclosure duty to commercial lease transaction].)

information relevant to the Cardozas' purchasing decision, causing them to sustain financial losses. A claim that a defendant's failure to exercise reasonable care resulted in financial loss is a negligence claim subject to the two-year statute of limitations in section 339, subdivision 1. (See *Smyth v. USAA Property & Casualty Ins. Co.* (1992) 5 Cal.App.4th 1470, 1477–1478; accord, *Cyr, supra*, 206 Cal.App.4th at p. 651.)

C. Accrual of the Cardozas' Causes of Action

The statute of limitations begins to run when the “cause of action accrues.” (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806 (*Fox*)). “Generally speaking, a cause of action accrues at ‘the time when the cause of action is complete with all of its elements.’ [Citations.] An important exception to the general rule of accrual is the ‘discovery rule,’ which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. [Citations.] [¶] A plaintiff has reason to discover a cause of action when he or she ‘has reason at least to suspect a factual basis for its elements.’ ” (*Id.* at pp. 806–807.)

The Cardozas contend that, even applying the two-year statute of limitations, their complaint (filed on June 30, 2009) was timely, because accrual of their causes of action against Gonsalves and Leading Edge was delayed under the discovery rule. We disagree. The evidence at trial (as summarized by the trial court) and the jury's findings establish the Cardozas had reason to discover their causes of action against Gonsalves and Leading Edge more than two years before they filed suit.

As the court noted, the Cardozas learned in July 2006 (two years and 11 months before they filed suit) that RPM was moving out of the Corby property and was planning to file a bankruptcy proceeding. And in response to a special interrogatory, the jury found that, before June 30, 2007 (i.e., the date two years before the complaint was filed), the Cardozas or their advisory team discovered or knew of facts that “would have caused a reasonable person to suspect that they had suffered harm that was caused by someone's

wrongful conduct[.]”⁸ In light of the Cardozas’ knowledge as established by the evidence and the jury’s finding, any cause of action based on alleged misrepresentations or nondisclosures or related conduct in connection with the Corby transaction (including nondisclosures about such matters as RPM’s financial viability and its intention to pay rent) accrued more than two years before the Cardozas filed suit.

The Cardozas argue that, although they discovered at some point that Reed was involved in wrongdoing, it was not until a later time (within two years before filing suit) that they learned of *Gonsalves’s* alleged involvement. The Cardozas contend the special interrogatory submitted to the jury on this point was defective, because it asked whether they had reason to suspect before June 30, 2007 that they had suffered harm caused by “someone’s wrongful conduct,” rather than asking specifically if they had reason to suspect they had suffered harm caused by Gonsalves’s conduct.

We reject this argument. The discovery rule “allows accrual of the cause of action even if the plaintiff does not have reason to suspect the defendant’s identity. [Citation.] The discovery rule does not delay accrual in that situation because the identity of the defendant is not an element of a cause of action.” (*Fox, supra*, 35 Cal.4th at p. 807.) Once the Cardozas had reason to suspect they had been misled about the Corby transaction, their causes of action based on that conduct accrued, even if the Cardozas were not yet sure who all the participants were. (See *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1114–1115 & fn. 13 [accrual not delayed where plaintiff was aware of injury caused by drug but did not know identity of drug’s manufacturer]; *Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 168–169, 178–179 [company executive who was aware of misconduct by company’s chief financial officer had basis to investigate possible related misconduct by company’s auditors; accrual of professional negligence and other claims against auditors was not delayed].)

⁸ The special interrogatory states: “Did the **Cardozas** or their advisory team discover or know of facts that would have caused a reasonable person to suspect that they had suffered harm that was caused by someone’s wrongful conduct before June 30, 2007?” The jury checked the blank for “Yes.”

This case is not similar to those cited by the Cardozas, in which the plaintiffs initially discovered one type of wrongdoing but later discovered a distinct type of wrongdoing; in that circumstance, accrual of a cause of action based on the later-discovered information was delayed under the discovery rule. (See *Fox, supra*, 35 Cal.4th at pp. 814–815 [knowledge of facts supporting medical malpractice claim did not start statute of limitations on later-discovered claim for products liability]; *Arroyo v. Plosay* (2014) 225 Cal.App.4th 279, 292 [decedent’s relatives initially knew of facts supporting claim that decedent’s body was mishandled after her death, but later discovered facts supporting distinct claims for medical malpractice and wrongful death arising from defendants’ negligent conduct while decedent was still alive].)

III. DISPOSITION

The judgment is affirmed. Gonsalves and Leading Edge shall recover their costs on appeal.

STREETER, J.

We concur:

POLLAK, P.J.

BROWN, J.

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